No. 75-708

In the Supreme Court of the United States

OCTOBER TERM, 1976

STANLEY MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A.1-A.19) is reported at 520 F.2d 913. The opinion of the district court (App. 45-58) is reported at 364 F. Supp. 1022.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1975. A petition for rehearing was denied on September 15, 1975. On October 6, 1975,

Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including November 14, 1975. The petition was filed on November 13, 1975, and was granted on March 1, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an obscenity prosecution that took place after *Miller* v. *California*, 413 U.S. 15, for conduct that occurred before that decision, the district court properly charged the jury under the standards announced in that decision.

2. Whether a court of appeals must view the materials in order to determine whether they are protected by the First Amendment.

3. Whether the jury was properly instructed to assess the materials in terms of the community standards of the judicial district from which the jurors were selected and in which the trial was held.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *

18 U.S.C. 1465 provides in pertinent part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lacivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> * * * * *

STATEMENT

1. In early 1973 the Cinema X Theatre in Newport, Kentucky, was managed by petitioner Marks

(Tr. 434, 559-560).[1] Petitioner Mohney owned the Cinema X Theatre; he also was the sole owner of petitioners American Amusement Company, Inc., and American News Company, Inc. The corporate petitioners had their offices in Durand, Michigan (G. Exhs. 48, 49). Petitioner Weir was the general manager and president of American Amusement (G. Exhs. 26, 27, 49).

Petitioner Weir scheduled movies for the Cinema X, and the booking of those movies was accomplished by American Amusement (Tr. 561-566). Weir also arranged for advertising of the theater (G. Exhs. 26, 27). Cinema X employees were paid by petitioner American News (Tr. 122, 437).

The films "Deep Throat" and "Swing High," as well as a number of previews,[2] were shown at the Cinema X in late January or in February 1973 (Tr. 500-501; G. Exh. 55). They were supplied by American Amusement and were sent to Cinema X from either Durand, Michigan, or Clarksville, Indiana (Tr. 446-448, 450, 459, 461-462, 488-489).[3]

2. On February 26, 1973, an Assistant United States Attorney applied to a federal magistrate for a warrant authorizing the search of the Cinema X

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[1] "Tr." refers to the transcript of the trial. "G. Exh." refers to exhibits introduced by the government at trial.

[2] The previews at issue here are entitled "Teenage Cowgirls," "Black on White," "A Few Bucks More," "Memoirs of a Madam," and "Doctor's Disciples."

[3] American Amusement owned a theater in Clarksville, Indiana (Tr. 647-648).

and the seizure of certain films (App. 10). Special Agent Vernon R. Glossup of the Federal Bureau of Investigation submitted an affidavit (App. 14-26) describing in some detail the films sought to be seized. Special Agent Ronald F. Aebly also submitted an affidavit (App. 11-13) describing more briefly one film and a preview.

The United States Magistrate notified petitioner Marks that a hearing would be held the next day to determine whether the warrant would be issued (App. 4-9). After this adversarial hearing the Magistrate issued the search warrant; the warrant was executed on February 27 and a return made on February 28 (App. 29-31).

On April 27, 1973, an indictment was returned in the United States District Court for the Eastern District of Kentucky, charging petitioners with conspiracy to transport obscene materials in interstate commerce, in violation of 18 U.S.C. 371, and with transportation of obscene materials in interstate commerce, in violation of 18 U.S.C. 1465 (App. 33-44).

Petitioners made a number of pretrial motions. The only motion relevant here is a motion, on multiple grounds, to dismiss the indictment. The district court denied the motion on October 5, 1973 (App. 47-52). After rejecting a number of arguments similar to arguments ultimately rejected by this Court in *Hamling* v. *United States*, 418 U.S. 87, the district court rejected petitioners' argument "that since *Miller* [v. *California*, 413 U.S. 15] formulated a new test of obscenity, prosecution of [petitioners] for con-

duct prior to that opinion would invoke the constitutional proscription of ex post facto culpability" (App. 49). The court observed that the *Ex Post Facto* Clause applies only to Acts of Congress, and stated (*ibid.*):

> Although Bouie v. City of Columbia, 378 U.S. 347 (1964), did hold that a retroactive application of a court interpretation may offend the Due Process Clause, it is evident that the factors present in the obscenity area render that case easily distinguishable; the Bouie holding should be applied only to decisions which are " 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue . . .'." Id. at 354. As admitted by the [petitioners], the previous uncertainty in the realm of obscenity has only been settled by the recent Supreme Court decisions. The Miller group did not create a new definition of illegal conduct, but merely clarified earlier concepts of obscenity of which the [petitioners] were constructively aware. Rosen v. United States, 161 U.S. 29 (1896); Nash v. United States, [229 U.S. 373]; United States v. Wurzbach, [280 U.S. 396]. Further, the Court's action in remanding Miller and its accompanying cases to the lower courts for reevaluation in light of the clarified standards intimates that the use of the Miller standard in the case at bar is entirely proper; prospective application would have been decreed if constitutional violation had been feared.

The district court consequently declined to dismiss the indictment.

3. The trial commenced on October 9, 1973, and lasted until October 19, 1973. The films, which were shown to the jury, were described by the court of appeals as follows (Pet. App. A.3 n.1):[4]

> A composite of all of the films and film previews depict acts of cunnilingus, fellatio, onanism, sodomy, male ejaculation, sexual intercourse and group sex.
>
> *Deep Throat*: portrayed a young female in quest of sexual fulfillment, which had eluded her because her clitoris was lodged in her throat. Scenes depicted males and females engaged in cunnilingus, sodomy, group sexual encounters where sodomy and fellatio were simultaneously practiced, sexual intercourse, and male ejaculation.
>
> *Swing High*: depicted a group sexual encounter where cunnilingus, fellatio, sexual intercourse, masturbation, onanism, and sodomy were practiced.
>
> Previews
>
> *Doctor's Disciples*: depicted acts of onanism, sexual intercourse, and male ejaculation.
>
> *Teenage Cowgirls*: two very young females are shown in close up scenes of fellatio and sexual intercourse.
>
> *Black on White*: depicted various acts of fellatio, cunnilingus and sexual intercourse by

[4] The films were not viewed by the court of appeals (Pet. App. A.19 n. 1 (McCree, J., dissenting)). The description set out in the opinion of the court apparently was based on the description of the films that appears in affidavits supporting an application for a search warrant (App. 11-26).

a white male with a black female and a black male with a white female.

Memoirs of a Madam: portrayed three couples on a bed in various stages of nudity engaging in oral and genital acts, and with one female masturbating with a vibrator. This preview also depicted a black male and white female engaged in sexual intercourse.

A Few Bucks More: portrayed fellatio, and male enjaculation [*sic*].

Petitioners presented the testimony of a psychologist, a minister, a psychiatrist, a sociologist, and an English teacher. These witnesses were of the view that the films were not patently offensive, did not appeal to the prurient interest under contemporary community standards,[5] and had serious artistic, literary, and scientific value (Tr. 353-355, 407-410, 745-755, 812-814, 825-835).

The district court instructed the jury that the test for obscenity is "[w]hether to the average person, applying contemporary community standards, the film taken as a whole appeals to the prurient interest" (App. 84). The court told the jury that it should find that the materials meet this test if three elements exist (*ibid.*):

> (1) whether the average person, applying contemporary community standards would find that

[5] Petitioners' experts based their opinions on standards in the Covington, Kentucky, area, where the trial occurred, as well as on standards in Cincinnati, Ohio, Minnesota, Maryland, and the nation as a whole (Tr. 328-329, 334, 348, 393, 739-740, 808).

> the film, taken as a whole, appeals to the prurient interest in sex; (2) whether the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and the lewd exhibition of the genitals, and (3) whether the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

The jury was instructed that the "contemporary community standards" to which it should refer are the standards generally held in the Eastern District of Kentucky.[6]

With regard to the third element of the test for obscenity, the jury was instructed (App. 89):

[6] The district court enlarged on that instruction in the following manner (App. 86-87):

> "Contemporary community standards" means the standards generally held throughout the Eastern District of Kentucky. We are not measuring this term "contemporary community standards" directly with what happened in Newport or on Monmouth Street, but it includes the whole Eastern District of Kentucky. You people on the jury are from different parts. Some of you are from Newport, Campbell County, maybe Monmouth Street, I don't know; others of you from out in Boone County, some in Bracken, some in Mason. This District extends to sixty-seven counties in Kentucky, goes throughout the whole eastern district of Kentucky, as I explained that to you when you qualified as jurors. So you are not to say, "Well, a thing like that wouldn't offend a person or even be obscene maybe under some conditions, but on the other hand, there are things we know to some people more prudish that even something of less significance then might be drawn from these films would be considered obscene. * * *

> Obscenity is excluded from constitutional protection because it is without serious social importance. Obscene utterances are no essential part of an exposition of ideas and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that a film deals with sex does not mean that it cannot have value to society. Indeed, such a film can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific, political or artistic value. It is for you to determine whether the film in issue in this case is of such value to society. If you find that it lacks serious literary, artistic, political, or scientific value, you can brand it obscene. If you find that it does have those, one or more of those adjectives that I have given you, then you should determine that it is not obscene.

The jury acquitted petitioners of the charge in Count 8 of the indictment, which involved the film preview "Let Me Count the Lays" (Tr. 939-943). The jury returned a verdict of guilty against petitioner American News on the conspiracy count. The other four petitioners were convicted on seven substantive counts and the conspiracy count (*ibid.*). Petitioners Marks, Mohney and Weir were sentenced to concurrent terms of 90 days' imprisonment and were fined $16,000. Each corporate petitioner was fined $5,000 on the conspiracy count. Petitioner American Amusement was fined $14,000 for its substantive convictions. See Tr. 944-950.

4. The court of appeals rejected (Pet. App. A.11-A.18) petitioners' argument that the charge to the jury should have been based upon the standards of *Roth* v. *United States*, 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, rather than upon the standards of *Miller* v. *California*, 413 U.S. 15. The court observed that the *Roth-Memoirs* test had never commanded the support of more than three Justices at one time, and that it "imposed a burden virtually impossible to discharge under our criminal standards of proof" (Pet. App. A.12). The court also believed that the district court was required to give the charge it gave "by the specific terms of the remand in *Miller*" (*id.* at A.14). Finally, the court indicated that the difference between the *Roth-Memoirs* standards and the *Miller* standards was immaterial in this case because "[i]t is plain to us that the material in the present case was obscene, irrespective of which standards are applied" (*id.* at A.12; see also *id.* at A.15). The court reached its decision that the films were unprotected by the First Amendment under either standard without viewing the films themselves.

The court concluded that the district court correctly had instructed the jury to apply the community standards of the judicial district where the trial was held (Pet. App. A.10-A.11). It held that the relevant community standards are those of the judicial district where the jurors reside, and not the standards of a nearby metropolitan area where some of the jurors may be employed.

Judge McCree dissented (Pet. App. A.18-A.19). He would have followed the three courts of appeals that held that it is unfair to apply the *Miller* standards to conduct occurring prior to the date of that decision. He declined to decide whether the films are in fact protected by the First Amendment, because "to speculate on our view of the films how the jury might have decided the case if it had been given the proper instructions would deny the right of trial by jury" (*id.* at A.19; footnote omitted).

SUMMARY OF ARGUMENT

I

Petitioners have been caught in a period of transition. Their conduct took place prior to *Miller*, and their trial took place after that decision. We believe that they cannot fairly be subjected to penalties for violations of rules established after their actions.

Although the *Ex Post Facto* Clause does not directly apply to judicial decisions, the principles of that Clause are deeply engrained in our law. The Court held in *Bouie* v. *City of Columbia*, 378 U.S. 347, that rules established by judicial expansion of the scope of a statute can apply only prospectively, lest individuals be deprived of fair warning of the acts prohibited. The same principle applies to judicial decisions relaxing constitutional restrictions that previously had limited a statute's scope; in either event, a person cannot fairly be subjected to punishment for acts that, when committed, could not have been punished.

Miller changed the prevailing rules. It discarded the *Memoirs* standards of obscenity and expanded the categories of material whose distribution and exhibition legitimately could be made criminal. Accordingly, the new standards should not have been used as the basis for the charge to the jury in petitioners' case. As in *Hamling* v. *United States*, 418 U.S. 87, 100-102, petitioners should receive the benefit but not the detriment of the changes in the law worked by *Miller*.

II

The court of appeals held that the films involved in this case are not "speech" within the meaning of the First Amendment. It came to this conclusion without looking at the films themselves. We agree with petitioners that this was error.

There are substantial reasons why judges of the courts of appeals should look at the offending materials. Distinguishing the obscene from the non-obscene involves a mixed question of fact and constitutional law implicating constitutional values that have long been the subject of special solicitude by the Executive Branch as well as the Judiciary. Because books and films must be assessed "as a whole" to determine whether they are obscene, affidavits and oral testimony at trial usually will be insufficient to enable the court to place the sexually-oriented material in the context in which it occurs. In most cases, the material speaks for itself. "The films, obviously, are the best evidence of what they represent." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56. Unless

the court examines the materials in question it may be unable adequately to discharge its obligation to provide an independent review.

The factors militating against examination of the films here are not of similar weight. We do not doubt that the task of looking at these films may be unpleasant and time-consuming for judges who are already overworked. But examination of the films will not make a legitimate conviction any less likely to be upheld on appeal, and it will provide, at least in some cases, an important safeguard for First Amendment rights. Accordingly, we conclude that the court of appeals should have looked at the allegedly obscene materials in this case. Its failure to do so requires a remand to allow it to carry out this task.

III

The jury was correctly instructed to consider the films in light of the contemporary community standards of the judicial district in which the trial was held. All of the jurors came from the district. The judicial district has been approved by this Court as the appropriate community on which the jury should draw. *Hamling, supra,* 418 U.S. at 105-106.

Petitioners' argument that the "metropolitan Cincinnati area" would have been more appropriate is beside the point. Appellate courts ought not to engage in the bootless task of selecting the "best" community from among the many arguably appropriate communities. The charge in this case served the purpose of the community standards instruction by en-

suring that the materials would be assessed on an objective basis rather than on the subjective sensibilities of the 12 people who happened to be selected as jurors. Like the instructions in *Hamling,* they were constitutionally adequate.

ARGUMENT

I

THE INSTRUCTIONS TO THE JURY WERE IMPROPER BECAUSE THEY WERE BASED ON A DEFINITION OF OBSCENITY THAT DID NOT PREVAIL AT THE TIME OF THE ACTS CHARGED IN THE INDICTMENT

A. Introduction

Petitioners' major contention is that the district court improperly charged the jury based upon the obscenity standards of *Miller* v. *California,* 413 U.S. 15, when the conduct alleged to constitute the crimes took place prior to *Miller.* They contend that the charge should have been based upon the standards of *Roth* v. *United States,* 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts,* 383 U.S. 413 (the *Roth-Memoirs* standards). A similar problem was involved in *Hamling* v. *United States,* 418 U.S. 87, which required the Court to decide what standards govern appellate review of cases that had been tried under the *Roth-Memoirs* standards, but which had not become final on the day *Miller* and related cases were decided.

Our brief in *Hamling* (No. 73-507, October Term, 1973) stated at page 14 that the "correct answer" to that problem is given by *United States* v. *Palladino*, 490 F.2d 499, 500 (C.A. 1). It quoted from *Palladino* as follows:

> We must now decide to what extent the standards articulated in the recent Supreme Court decisions dealing with state obscenity statutes apply to this federal case retroactively. The defendants are caught in a period of transition, their prosecutions having taken place before the *Miller* decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions. On the other hand, the remand of the entire group of pending obscenity prosecutions suggests that to the extent that *Miller* creates protections not afforded by prior standards, these cannot be denied to persons whose prosecutions have not terminated. * * * [Footnote omitted.]

The Court accepted our argument in *Hamling*. It reviewed the materials in question and found "that the jury could constitutionally find [them] obscene under the *Memoirs* test" (418 U.S. at 100). It gave petitioners the benefit, but not the detriment, of the changes in the law occasioned by *Miller*. 418 U.S. at 102.

We believe that the same principle governs this case. Petitioners "are caught in a period of transition." "They cannot fairly be subjected to penalties for violation of rules established after their actions." [7]

[7] We concluded in *Hamling* (Br. 24) that the *Miller* standards "have no applicability to * * * pre-*Miller* conduct."

Accordingly, the district court should have given the jury a charge based upon the *Roth-Memoirs* standards, and on review the court of appeals should have given petitioners the benefit, but not the detriment, of the *Miller* standards. This principle is supported by the clear consensus of the courts that have considered this question.[8] Accordingly, the judgment of the court of appeals should be reversed and the case remanded for a new trial. We explain below at greater length why we have reached this conclusion.

[8] See *United States* v. *Linetsky*, 533 F.2d 192, 201-203 (C.A. 5); *United States* v. *Jacobs*, 513 F.2d 564 (C.A. 9); *United States* v. *Sherpix, Inc.*, 512 F.2d 1361 (C.A.D.C.); *United States* v. *Wasserman*, 504 F.2d 1012 (C.A. 5). *Contra*, *United States* v. *Friedman*, 528 F.2d 784 (C.A. 10), petition for a writ of certiorari pending, No. 75-1663.

Jacobs, *Sherpix* and *Wasserman* are supported by *Palladino*, *supra*, and *United States* v. *Thevis*, 484 F.2d 1149 (C.A. 5), certiorari denied, 418 U.S. 932, in which the defendants were convicted prior to *Miller*. In each case the court stated that *Roth-Memoirs* was the required standard (*Palladino*, *supra*, 490 F.2d at 500; *Thevis*, *supra*, 484 F.2d at 1155). The court in *Thevis* judged the materials independently under both tests. In *Palladino* the court remanded for a new trial under the *Roth-Memoirs* standards.

Most of the state courts that have considered the issue have concluded that pre-*Miller* conduct must be tried under the *Roth-Memoirs* standards. *State* v. *Timmons*, 12 Wash. App. 48, 527 P.2d 1399; *State* v. *DeSantis*, 65 N.J. 462, 323 A.2d 489; *State* v. *Harding*, 114 N.H. 335, 320 A.2d 646; *State* v. *Welke*, 298 Minn. 402, 216 N.W.2d 641; *Rhodes* v. *State*, 283 So.2d 351 (Sup. Ct. Fla.). Contra, *McKinney* v. *City of Birmingham*, 52 Ala. App. 605, 296 So.2d 197 (Ct. Crim. App.), certiorari denied, 292 Ala. 2d, 726, 296 So.2d 202; *State ex rel. Chobot* v. *Circuit Court for Milwaukee County*, 61 Wis. 2d 354, 212 N.W.2d 690. See also *State* v. *Combs*, 536 P.2d 1301 (Ct. Crim. App. Okl.).

B. The Due Process Obligation To Give Fair Notice Requires That A Change In The Standards Of Proof Easing The Government's Burden In A Criminal Case Be Applied Prospectively Only

The application of new standards of criminal conduct to acts that took place before the new standards were announced would further no appropriate societal objectives. The new standards could not deter the newly-forbidden acts, for those acts already would have taken place. Moreover, to the extent that the new standards made criminal conduct that theretofore had not been criminal, retroactive application would be unfair, because it would punish persons for acts that were not illegal when committed.

The framers of the Constitution thought the principle that laws shall not retroactively penalize acts that were not forbidden when they occurred so important that they expressly provided that Congress shall pass no *ex post facto* law.

The first decision of this Court interpreting the *Ex Post Facto* Clause has been definitive. The understanding of the meaning of that Clause has not changed significantly since Mr. Justice Chase announced for a unanimous Court[9] in *Calder* v. *Bull*, 3 Dall. 385, 390, that a law is an *ex post facto* law if it makes criminal acts which were not forbidden when they occurred, if it increases the punishment for criminal acts, or if it "alters the legal rules of evidence, and receives less, or different testimony,

[9] The opinions in *Calder* were announced *seriatim*, but no other Justice took issue with Mr. Justice Chase.

than the law required at the time of the commission of the offence, in order to convict the offender."

The *Ex Post Facto* Clause is a limitation upon the powers of Congress. It consequently does not apply directly to judicial decisions. *Frank* v. *Mangum*, 237 U.S. 309. But the principles embodied by the *Ex Post Facto* Clause are deeply engrained in our jurisprudence. The Clause applies directly only to Congress, but "a comparable judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce* v. *United States*, 314 U.S. 306, 311. A statute cannot have given fair warning of what it prohibits if, as construed by the courts, its scope is extended to the conduct in question only after the conduct had taken place.

A law is an *ex post facto* law if "in [its] relation to the offence, or its consequences [it] alters the situation of a party to his disadvantage" or "takes away or impairs the defence which the law has provided the defendant" at the time of the offense. *Kring* v. *Missouri*, 107 U.S. 221, 228-229 (quoting from *United States* v. *Hall*, 26 Fed. Cas. 84, 86-87 (No. 15,285)). In *Bouie* v. *City of Columbia*, 378 U.S. 347, the Court was confronted with a judicial interpretation of a state statute by a state court that altered the situation of a party to his disadvantage. It wrote (378 U.S. at 352-354):

> There can be no doubt that a deprivation of the right of fair warning can result not only from

> vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. * * * Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. * * * If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

The Court consequently reversed the conviction, which was based, as the Court understood it, upon an unexpected judicial expansion of clear statutory language.

Rabe v. *Washington*, 405 U.S. 313, applied the *Bouie* principle to an obscenity case. Rabe was charged under a state statute with showing an obscene film. The state courts were unable to find the film obscene under the *Roth-Memoirs* standards, but they upheld Rabe's conviction because, in "the context of its exhibition," it was obscene (405 U.S. at 315). The Court reversed, holding that the meaning of the statute could not be judicially expanded in this fashion after the conduct had occurred.[10]

If *Miller* had expanded the scope of clear and precise statutory language, then the Due Process

[10] See also *Douglas* v. *Buder*, 412 U.S. 430 (applying the *Bouie* principle to a state court's redefinition of the word "arrest" to include a traffic citation); *United States* v. *Potts*, 528 F.2d 883, 886 (C.A. 9) (*en banc*).

Clause, as interpreted in *Bouie* and *Rabe*, would prohibit applying the new standards to pre-*Miller* conduct. That, however, is not what happened. 18 U.S.C. 1465, the substantive statute upon which the prosecutions in this case were based, is sweeping. It prohibits all transportation in interstate commerce for the purpose of sale or distribution of "any obscene, lewd, lascivious, or filthy * * * film * * * or other article capable of producing sound or any other matter of indecent or immoral character * * *." *Miller* announced a constitutional standard that limited the reach of any statute to a constitutionally-defined group of "obscene" materials. See generally *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130, n. 7. The conduct described in Section 1465 can be punished only if it satisfies the constitutional test of "obscenity": the film as a whole appeals to the prurient interest of the average person, applying contemporary community standards; it depicts sexual conduct in a patently offensive way; and if, taken as a whole, it "lacks serious literary, artistic, political, or scientific value." *Miller*, *supra*, 413 U.S. at 24.

Bouie and *Rabe* involved cases of judicial expansion of statutory language. *Miller* did not expand the scope of a statute, but rather restricted it. Many cases before *Miller*, however, also had considered the constitutional standards applying to obscenity litigation. These cases, too, had announced rules restricting the application of the statutes. We be-

lieve that, if *Miller* relaxed the constitutional rules that previously had prevailed, its effect would be indistinguishable from judicial expansion of statutory language.

In either event, the new rule comes as a surprise to a person who believed that the old rule (whether statutory or constitutional) would be applied to his conduct. A person planning his affairs prior to the judicial decision expanding the scope of the statute's ambit of prohibition is caught unawares. He finds himself subjected to punishment for an act that, at the time it occurred, could not have been punished under prevailing legal rules. That change, if applied retroactively, would deprive a defendant of his constitutional right to fair notice of the rules that govern his conduct.

Perhaps there is room for legitimate differences of opinion about whether, in the run of cases, the *Bouie* principle should apply to judicial relaxation of judicially-created constitutional limitations upon the scope of a statute. When the case involves the First Amendment protection of free speech, however, the requirement of a fair warning is especially compelling. *Hynes* v. *Mayor and Council*, No. 74-1329, decided May 19, 1976, slip op. 10-13; *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip op. 35-38; *Smith* v. *Goguen*, 415 U.S. 566, 573. We submit that to the extent *Miller* changed the prevailing standards for determining what is obscene and what is not, and to the extent that it made obscenity (however defined) easier for the prosecution to prove,

the new standards cannot fairly be applied to conduct that took place before those standards were announced.

We next discuss whether, and to what extent, *Miller* changed the prevailing standards of obscenity.

C. *Miller* Significantly Altered The Prevailing Standards Of Obscenity By Permitting Material To Be Found Obscene That Would Not Have Been Obscene Under The Prior Test

The court of appeals held that the *Bouie* principle does not forbid the giving of jury instructions based upon *Miller* in a trial involving pre-*Miller* conduct. This is so, it wrote, because the *Roth-Memoirs* standards never commanded the adherence of a majority of the Justices at one time, and so did not state the law. Since those standards never were the law, *Miller* did not "change" the law.[11] This Court, too, has observed on several occasions that the position of the plurality in *Memoirs* never became the position of a majority of the Court. *Miller*, *supra*, 413 U.S. at 15, 21-22, 24-25; *Hamling*, *supra*, 418 U.S. at 116-117.

The position of the plurality in *Memoirs* was a sharp break with earlier decisions of the Court in obscenity cases. The Court had concluded in *Roth*, its first constitutional obscenity decision, that the portrayal of sex does not by itself make material obscene. It held that material is obscene only if it

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[11] *United States* v. *Friedman*, 528 F.2d 784 (C.A. 10), petition for a writ of certiorari pending, No. 75-1663, takes the same position.

"deals with sex in a manner appealing to prurient interest" (354 U.S. at 487), and that if it meets this standard it is "utterly without redeeming social importance" (354 U.S. at 484). The Court announced the following test for applying these principles: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." This formulation, it found, withstood "the charge of constitutional infirmity" (354 U.S. at 489).

From *Roth* until *Miller* no majority of this Court was able to agree on any different formulation of the test of obscenity.

Manual Enterprises, Inc. v. *Day*, 370 U.S. 478, was decided five years after *Roth*. Mr. Justice Harlan, in an opinion joined only by Mr. Justice Stewart, concluded that materials could not be deemed legally obscene unless they were patently offensive in addition to appealing to the prurient interest (370 U.S. at 482, 486). They thought that the patent offensiveness element was implicit in *Roth* and necessary to assure access to "worthwhile works in literature, science, or art" (370 U.S. at 487). Mr. Justice Black concurred in the result; two Justices took no part in the decision; three Justices thought that the postal regulation in issue was unauthorized by statute; Mr. Justice Clark dissented.

Two years later, in *Jacobellis* v. *Ohio*, 378 U.S. 184, Mr. Justice Brennan, joined only by Mr. Justice Goldberg, stated that in obscenity cases the Court is required to make an independent constitutional

judgment whether materials are constitutionally protected (378 U.S. at 187-190). They suggested that in making that judgment prurient appeal could not be balanced against social importance, because, in their view, "a work cannot be proscribed unless it is 'utterly' without social importance" (378 U.S. at 191). Mr. Justice Black and Mr. Justice Douglas concluded that any prosecution for obscenity violates the First Amendment; Mr. Justice Stewart concluded that the motion picture involved in the case was not "hard-core pornography" (378 U.S. at 197) and hence not obscene; Mr. Justice White concurred without opinion; three Justices dissented.

Mr. Justice Brennan's opinion in *Jacobellis* foreshadowed the plurality view announced two years later in *Memoirs*. The opinion by Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Fortas, stated that obscenity, as defined in *Roth*, exists only if three elements coalesce (383 U.S. at 418):

> (a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Mr. Justice Black and Mr. Justice Douglas concurred in the reversal of the judgment holding the book obscene, writing once more that obscenity is absolutely protected by the First Amendment. Mr.

Justice Stewart, also concurring in the judgment, adhered to the view that "hard-core pornography" can be forbidden; applying this standard, he found the materials in *Memoirs* not to be obscene.

In separate dissenting opinions, Mr. Justice Clark and Mr. Justice White asserted that the test adopted by the plurality was contrary to the intent of *Roth*. Agreeing that the social importance of materials is relevant to the issue of obscenity under *Roth*, they concluded that lack of social value is not an independent constitutional test. Mr. Justice Harlan, also dissenting, held to the view that federal prosecution of allegedly obscene matter is limited to "hard-core pornography," "material that is patently offensive or whose indecency is self-demonstrating" (383 U.S. at 457).

Following this, in the brief *per curiam* opinion in *Redrup* v. *New York*, 386 U.S. 767, the Court began the practice of reviewing allegedly obscene materials in light of the differing views of the various Justices. Thirty-one cases were subsequently reversed on the authority of *Redrup*. They are collected in Mr. Justice Brennan's dissenting opinion in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 82-83 n. 8. That practice ended when the Court was able to assemble a majority in *Miller* for a single standard of obscenity.

As this brief survey of the twists and turns of obscenity law between *Roth* and *Miller* shows, the prevailing standards were far from clear. An argument in support of the judgment of the court of ap-

peals would start from this point. It would proceed much as follows: The standards adopted by the plurality in *Memoirs* did not derive from *Roth* but were, as the dissenting Justices pointed out in *Memoirs*, and as the Court held in *Miller*, a significant departure from the *Roth* standards. See *Miller*, *supra*, 413 U.S. at 21. The test propounded by the *Memoirs* plurality never commended the adherence of more than three Justices. Because only a minority of the Court subscribed to the new standards, the *Roth* standards remained as the definitive expression of constitutional law.[12] Those who were engaged in purveying sexually-oriented materials between *Roth* and *Miller* were accordingly obliged to look to the *Roth* standards alone. Once *Miller* held that the *Memoirs* standards were not required by the Constitution (see 413 U.S. at 21-25), *Miller* became the controlling decision. The standards of *Miller* are not significantly different from the standards of *Roth*.[13] Thus, the argument would conclude, all trials now should take place under the *Miller* standards, no matter when the conduct in question occurred.

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[12] Cf. *United States* v. *Pink*, 315 U.S. 203, 216, holding that an affirmance by an equally divided Court is of no precedential effect because "the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." See also *Alaska* v. *Troy*, 258 U.S. 101, 111; *Hertz* v. *Woodman*, 218 U.S. 205, 212-214.

[13] Indeed, because of the requirement stated in *Miller* that each statute explicitly describe the depictions made criminal, it could be argued that the rule of *Miller* is more favorable to defendants than were the *Roth* standards.

In our view, however, this argument is unavailing. Between 1966 and 1973 the test in *Memoirs* was the prevailing rule. Once the Court began the practice in *Redrup* of reversing obscenity convictions based on the views of each individual Justice, the *Memoirs* standards became of central importance. Because Justices Black and Douglas believed that obscenity was constitutionally protected, no conviction could obtain the five votes necessary for its upholding unless it satisfied the tests laid down by the *Memoirs* plurality.

We submit that our brief in *Hamling* (pp. 33-34) put the matter in proper perspective.

> The Court stated in *Miller*, *supra*, 413 U.S. at 22, n. 3, that "[i]n the absence of a majority view," the Court began the practice in *Redrup*. This statement can not be interpreted to mean that the *Roth-Memoirs* standards were "unworkable;" they had not been overruled, and therefore, they were still the law and continued to guide lower courts, and people in general, in judging obscenity. Indeed, an analysis of *Redrup* indicates that at least three Justices subscribed to the *Roth-Memoirs*' standards,[19] two did not believe that obscenity could be constitutionally regulated,[20] and two others followed the original *Roth* formulation absent the "utterly without redeeming social value" test of *Memoirs*.[21] Accordingly, persons whose conduct did not transgress the *Roth-Memoirs* standards could not be constitutionally convicted of violating obscenity

> laws, since at least five Justices would find their actions constitutionally protected.

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[19] Chief Justice Warren, Justices Brennan and Fortas adhered to the *Roth-Memoirs* formulation. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 414.

[20] Justices Black and Douglas believed obscenity was absolutely protected by the First Amendment. See *Ginzburg* v. *United States*, 383 U.S. 463, 476, 482 (dissenting opinions).

[21] Justices Clark and White followed the *Roth* formulation but did not accept the "utterly without redeeming social value" test. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 441, 460 (dissenting opinions).

The Court has recognized that when no position commands a majority of the Justices, the rule of the case is expressed by the most narrow view of a Justice or group of Justices concurring in the disposition. See *Gregg* v. *Georgia*, No. 74-6257, decided July 2, 1976, slip op. 12 n. 15, 38-39 n. 47 (opinion of Stewart, Powell and Stevens, JJ.); *Roberts* v. *Louisiana*, No. 75-5844, decided July 2, 1976, slip op. 9-11 (White, J., dissenting). The views of the plurality in *Memoirs* consequently became the prevailing rule.[14]

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[14] See also *Green* v. *Oklahoma*, No. 75-6451, decided July 6, 1976, holding a state statute unconstitutional on the basis of two decisions—*Woodson* v. *North Carolina*, No. 75-5491, decided July 2, 1976, and *Roberts*, *supra*—in which no opinion was signed by a majority of the Justices. The disposition in *Woodson* and *Roberts* was similar in many ways to the disposition in *Memoirs*. In each case three Justices made up a plurality and were joined in the disposition by two Justices who concurred in the result. If *Woodson* and *Roberts* established a rule that could be followed in *Green*, then *Memoirs* must have established a rule.

Every court of appeals that considered the matter between *Memoirs* and *Miller* held, on similar reasoning, that the charge to the jury must be based on the *Roth-Memoirs* standards.[15] The fact is that until *Miller* was announced, any person planning his affairs would have concluded that he could not be convicted in an obscenity prosecution unless the prosecution could meet the *Roth-Memoirs* standards. *Miller* added a "clarifying gloss" to *Roth* (see *Hamling*, *supra*, 418 U.S. at 116), but in the process it discarded entirely the *Memoirs* standards.

The Court has recognized that *Miller* changed the constitutional test of obscenity. In *Miller* itself the trial had taken place after *Memoirs*, and the jury had been charged under the *Roth-Memoirs* standards. The Court indicated that this was proper, because the *Memoirs* test was "correctly regarded at the time of trial as limiting state prosecution under controlling case law" (413 U.S. at 30-31). The *Miller* Court explicitly formulated new rules to alleviate the almost impossible burden of proof that had been imposed on the prosecution by this "controlling case law."

[15] *Books, Inc.* v. *United States*, 358 F.2d 935 (C.A. 1), reversed, 388 U.S. 449; *United States* v. *Manarite*, 448 F.2d 583 (C.A. 2), certiorari denied, 404 U.S. 947; *United States* v. *Dellapia*, 433 F.2d 1252 (C.A. 2); *United States* v. *35 mm. Motion Picture Film*, 432 F.2d 705 (C.A. 2), certiorari dismissed *sub nom. United States* v. *Unicorn Enterprises, Inc.*, 403 U.S. 925; *United States* v. *Pellegrino*, 467 F.2d 41 (C.A. 9); *United States* v. *Young*, 465 F.2d 1096 (C.A. 9); *Southeastern Promotions Ltd.* v. *Oklahoma City*, 459 F.2d 282 (C.A. 10); *Huffman* v. *United States*, 470 F.2d 386 (C.A. D.C.), reversed, 502 F.2d 419 (C.A.D.C.). Cf. *Phelper* v. *Decker*, 401 F.2d 232, 240 (C.A. 5).

Although the *Miller* Court repeatedly emphasized that the *Memoirs* test had been endorsed by only three Justices, it also recognized that these three Justices combined with two Justices who believed that all obscenity was constitutionally protected to change the basic legal rules. It wrote (413 U.S. at 21; emphasis added) that in *Memoirs* "the *Court* veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a *new test* of obscenity."

The same understanding is reflected in *Hamling*, which involved pre-*Miller* conduct that had been tried prior to *Miller* under the *Roth-Memoirs* standards. The Court reviewed the materials and found "that the jury could constitutionally find the brochure obscene under the *Memoirs* test" (418 U.S. at 100). Having reviewed the material under *Memoirs*, the Court also held that "any constitutional principle enunciated in *Miller* which would serve to *benefit* petitioners must be applied in their case" (*id.* at 102; emphasis added).

The Court explained (*id.* at 116) that it had rejected *Memoirs* "because it represented a departure from the definition of obscenity in *Roth*." It stated (*id.* at 116-117): "[s]ince *Miller* permits the imposition of a lesser burden on the prosecution * * * than did *Memoirs*, and since the jury convicted these petitioners on the basis of an instruction concededly based on the *Memoirs* test, petitioners derive no

benefit from the *revision* of that test in *Miller*" (emphasis added).

Miller characterized the *Roth-Memoirs* standards as "controlling case law." *Hamling* characterized *Miller* as a "revision" of the *Roth-Memoirs* standards. Accordingly, the charge to the jury in this case should have been based on the *Roth-Memoirs* standards, which prevailed at the time of the acts charged in the indictment.[16] Any other rule would deprive petitioners of fair notice of the standards under which their conduct would be evaluated, a warning that is particularly important in First Amendment cases.

D. The Error In The Charge To The Jury Was Not Harmless

The court of appeals wrote (Pet. App. A.12) that "[i]t is plain to us that the material in the present case was obscene, irrespective of which standards are

[16] It could be argued that the *Memoirs* standards met an earlier demise. *Kois* v. *Wisconsin*, 408 U.S. 229, reversed an obscenity conviction without mentioning *Memoirs* or *Redrup*. The Court relied on *Roth* and emphasized that the materials bore "some of the earmarks of an attempt at serious art" (408 U.S. at 231). Because petitioners' conduct took place after *Kois*, it could be argued that they were no longer entitled to rely on the *Memoirs* formulation.

We do not believe that the argument would be tenable. *Kois* reversed a conviction; because the materials were protected under the *Roth* standards, the Court had no occasion to refer to the more rigorous formulation of the *Memoirs* plurality. The Court did not explicitly discuss or reject the *Memoirs* formulation. It is unlikely that the Court thereby intended implicitly to effect such a significant change in constitutional doctrine.

applied." See also Pet. App. A.15, A.18. This suggests that the court of appeals believed that any error in the charge to the jury was harmless. We expressed a similar position in our Brief in Opposition.[17] Further reflection has convinced us, however, that the error was not harmless.

Because the court of appeals never viewed the films, its opinion that they are obscene under both the *Roth-Memoirs* and the *Miller* standards is not properly supported. See pages 34-41, *infra*. This defect could be rectified without a new trial. But even if the court of appeals were convinced upon seeing the films that they are obscene under either set of standards, that conclusion would not be a satisfactory substitute for the opinion of a properly instructed jury.

This Court has described the *Roth-Memoirs* standards as creating a burden of proof "virtually impossible" for the government to satisfy (*Miller*, *supra*, 413 U.S. at 22). Although we believe, as did the court of appeals, that the proof in this case satisfied that burden, we do not believe that it would be fair to characterize as "harmless" the giving of instructions that relieved the prosecution of that burden and allowed the jury to convict on a lesser amount

[17] We stated (Br. in Opp. 4; footnote omitted): "The films fall so squarely within the guidelines applicable both prior to and after *Miller* that petitioners could not have been prejudiced by the instructions given, even if those instructions were erroneous."

of proof.[18] We cannot say that the error was harmless "beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24.[19]

II

THE COURT OF APPEALS SHOULD HAVE VIEWED THE FILMS TO DETERMINE WHETHER THEY ARE PROTECTED BY THE FIRST AMENDMENT

Petitioners contended on appeal that the films are protected by the First Amendment and are not obscene. The court of appeals disagreed. It undertook to make an independent constitutional judgment, as this Court had done in *Jenkins* v. *Georgia*, 418 U.S. 153, to ensure that petitioners had not been convicted for speech protected by the First Amendment. It believed, however, that it could make this independent review without looking at the films themselves. We agree with petitioners that the court of appeals

[18] Cf. *Henderson* v. *Morgan*, No. 74-1529, decided June 17, 1976, slip op. 3-4 (White, J., concurring): "It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged." See also *Mullaney* v. *Wilbur*, 421 U.S. 684.

[19] Our conclusion that the error was not harmless is fortified by the fact that six months after petitioners' trial an Ohio criminal prosecution of the movie "Deep Throat," tried under the *Roth-Memoirs* standards in the Cincinnati area, ended in an acquittal by the jury. *State* v. *Cine-Ohio, Inc.*, Ct. Common Pleas, Hamilton County, Ohio, No. B-73 2801, verdict returned April 24, 1974.

could not adequately discharge its reviewing function without looking at the films.[20]

The United States has no interest in arguing that courts of appeals ought not to look at allegedly obscene materials in order to determine whether they are protected by the First Amendment. The task of looking at these materials may be unpleasant and time-consuming for judges; these are strong reasons for holding to a minimum the time and effort that must be invested by already overworked judges in looking at allegedly obscene matter. These interests are most closely associated with judicial administration, a matter in which the Executive Branch possesses little expertise. But this we know: the fact that judges of the court of appeals view the materials at issue in a particular case will not make a legitimate conviction less likely to occur, nor will it undermine the administration of justice in any particular.

At the same time, there are substantial reasons why judges of the courts of appeals should look at the offending materials. Distinguishing the obscene from the non-obscene involves a mixed question of fact and constitutional law. The question in every case is whether the materials are, in fact, "speech" pro-

[20] Our Brief in Opposition argued (p. 5) that "a personal viewing of the films is not a constitutionally-necessary prerequisite" to an independent appellate determination that they are obscene. Further consideration has led us to conclude that that position reflected insufficient attention to the First Amendment values involved. For the reasons discussed in the following text, we no longer adhere to it.

tected by the First Amendment. That is a sensitive question implicating constitutional values that have long been the subject of special solicitude by the Executive Branch as well as by the Judiciary.

The question presented in this case is not whether the courts of appeals have an obligation in appropriate cases to make an independent determination whether the materials are obscene—they clearly do —but whether they have the additional obligation to view the materials in order to make that determination. We believe that this question cannot be answered categorically; the answer must depend upon whether other information is sufficient to enable the appellate court to make an informed judgment about the materials as a whole.

Ever since *Roth* it has been unquestioned that books and films must be assessed "as a whole." Material is not obscene simply because it contains discussions or portrayals of sex. The material "as a whole" must appeal to the prurient interest, be patently offensive, and lack redeeming literary, artistic, political or scientific value. See *Miller*, *supra*, 413 U.S. 24; *Kois* v. *Wisconsin*, *supra*, 408 U.S. at 230; *Memoirs*, *supra*, 383 U.S. at 418; *Roth*, *supra*, 354 U.S. at 489.

In some cases it will not be necessary to look at the material itself in order to determine whether, viewed "as a whole," the material is obscene. For example, if the defendant were to agree that a particular affidavit or other statement fairly summarized the materials, there would be no need to look beyond

the summary. Unless the defendant wanted the court to examine the materials, there would be no need for it to do so. But that is not what happened in this case; petitioners asked the court of appeals to examine the films, but it considered only the testimony at trial and the descriptions of the films contained in the affidavits submitted in support of the application for the search warrants.

A review of the testimony at trial and of affidavits submitted in support of an application for a warrant is usually not sufficient to enable an appellate court to review the materials "as a whole." Affiants need only demonstrate that there is probable cause to support a warrant. They are at liberty to take parts of a film out of context and to omit descriptions of portions of a work that might indicate literary or artistic value. Their descriptions are not subject to cross-examination. And, although descriptions of the work contained in trial testimony may be more complete, they may amount to no more than a gloss on the material where, as here, it is exhibited to the jury.

Even events described fully on the printed page may appear in a different light in the film itself; the spoken or written word often cannot adequately convey the subtleties of a film or assess its artistic worth. Indeed, for these very reasons the Court has held that "expert" testimony is unnecessary in an obscenity case (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56) and that allegedly comparable materials need not be admitted into evidence (*Hamling*, *supra*,

418 U.S. at 125-127). "The films, obviously, are the best evidence of what they represent." *Paris Adult Theatre I, supra,* 413 U.S. at 56.

The context in which the sexually-oriented matter appears is critical to the determination whether, viewed "as a whole," the material is obscene. James Joyce's *Ulysses* might be judged obscene on the basis of isolated passages which were lifted out of context and described in affidavits or oral testimony; viewed as a whole, however, *Ulysses* is not obscene. *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D. N.Y.), affirmed, 72 F.2d 705 (C.A. 2). Although the films involved in this case are certainly not in the same literary class as *Ulysses,* the principle is the same: the materials must be viewed to determine whether, "as a whole," they are outside the scope of the First Amendment.

The position we have outlined above is the traditional one. Since *Roth* appellate courts routinely have looked at the materials in question to determine whether they are obscene. See generally *United States* v. *Linetsky, supra; United States* v. *Thevis,* 526 F.2d 989 (C.A. 5); *United States* v. *Gates,* 481 F.2d 605, 606 (C.A. 5). The practice of examining the materials themselves has been so nearly uniform that, so far as we can determine, the instant case is the first in which the court of appeals chose to sustain a conviction without examining the materials. It did so without explanation.

The only other court of appeals to decide that examination of the materials is unnecessary is *United States* v. *American Theatre Corp.,* 526 F.2d 48 (C.A. 8), petition for a writ of certiorari pending, No. 75-985. That court acknowledged (*id.* at 49) that it "has the obligation to independently determine whether the questioned material is obscene," but it asserted (without supporting reasoning) that it could discharge that obligation without examining the materials. Three judges dissented from the denial of rehearing *en banc*; they argued that the appellate court has an obligation to examine the materials in order to carry out their duty to use " 'sensitive tools' " to separate legitimate speech from unprotected speech (*id.* at 51, quoting from *Speiser* v. *Randall,* 357 U.S. 513, 525).[21]

Examination of the materials not only is supported by the need to use "sensitive tools" to distinguish between obscenity and protected speech, but also is in harmony with the practice of this Court. To the best of our knowledge, the Court has viewed the

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[21] It does not follow, however, that *American Theatre* was wrongly decided on its facts. The court of appeals relied on a stipulation of the contents of the films in finding them to be obscene. As we have suggested, review of stipulated facts may be an adequate substitute for an examination of the materials, because a defendant presumably would not stipulate to a description of the materials that did not fairly represent them. The more narrow question in *American Theatre,* therefore, is whether defendants can strategically rely on the stipulation in the district court (so that the jury does not see the films) and then, in a change of strategy, ask the court of appeals to make a *"de novo"* judgment on obscenity.

materials themselves whenever, in a case accepted for plenary review, it has been called upon to determine whether the materials are obscene. See, *e.g.*, *Jenkins* v. *Georgia*, *supra*, 418 U.S. at 158: *Hamling*, *supra*, 418 U.S. at 100-102; *Miller*, *supra*, 413 U.S. at 29-30; *Manual Enterprises, Inc.* v. *Day*, *supra*, 370 U.S. at 488. We believe that the court of appeals should have followed the same course, and that its judgment should be vacated and the case remanded with instructions to examine the films.[22]

Nothing we have said here is intended to suggest that this Court also has an obligation to examine allegedly obscene materials in every case. See, *e.g.*, *Jacobellis* v. *Ohio*, *supra*, 378 U.S. at 189, 190 n. 6 (plurality opinion); *Jenkins* v. *Georgia*, *supra*, 418 U.S. at 163 (Brennan, J., concurring). There is an important distinction between the obligations of an appellate court of first instance and the obligations

[22] This can be accomplished without a new trial. Consequently, no prosecutorial or judicial resources have been expended unnecessarily on this account. The ease with which this error can be rectified is an important factor that led to our decision not to support the decision of the court of appeals on this issue.

If the Court agrees with the arguments we have made at pages 15-34, *supra*, a new trial will be required. In that event, we believe that this Court should instruct the court of appeals to examine the materials on remand before returning the case to the district court for another trial. It would be a waste of scarce judicial resources to hold a new trial if, on appeal and after examination of the films, the court of appeals were to determine that one or more of them is protected by the First Amendment.

of this Court.[23] Review by this Court of federal criminal convictions is discretionary; a case comes here only after one or more lower courts already has made an independent determination that the materials in question are obscene. There is no more need for this Court to examine each film or book—which amounts to deciding the case on its merits—than there is for it to decide on the merits all cases of any other legal category. See *J-R Distributors, Inc.* v. *Washington*, 418 U.S. 949, 950 (opinion of White, J.); *Liles* v. *Oregon*, No. 75-983, certiorari denied, May 3, 1976 (opinion of Stevens, J.).

The courts of appeals have a duty to decide on the merits all cases brought to them. It is that duty, a duty this Court does not share in most cases, that compels them to examine the allegedly obscene materials. A single review of that question by an appellate court should be sufficient in all but the exceptional case; there is therefore no need for this Court to examine the materials once again.

III

THE JURY WAS PROPERLY INSTRUCTED TO APPLY THE CONTEMPORARY COMMUNITY STANDARDS OF THE JUDICIAL DISTRICT IN WHICH THE TRIAL TOOK PLACE

The jury was instructed to assess the films in this case in accordance with the contemporary community standards "generally held throughout the Eastern

[23] Cf. *Ross* v. *Moffitt*, 417 U.S. 600.

District of Kentucky" (App. 86). Petitioners contend that the court should have instructed the jury to apply the standards of the Cincinnati metropolitan area, where many of the jurors lived and worked.[24]

This Court's cases offer no support to petitioners. In fact, the district court appears to have anticipated *Hamling* in this regard; the Court indicated in *Hamling* that the relevant community ordinarily should be the judicial district in which the trial took place. The Court wrote (418 U.S. at 105-106) that since petitioners in *Hamling* had been tried in the Southern District of California, "and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw."

Petitioners respond that the jury in their case was drawn from Covington, Kentucky, that Covington is a suburb of Cincinnati, Ohio, and that half of the jurors were employed in Cincinnati. Assuming *arguendo* that these assertions are correct,[25] they would

[24] Petitioners sought such an instruction at trial (Tr. 920-921).

[25] Nothing in the record supports the statement of petitioners (Br. 17) that half of the jurors were employed in Cincinnati. Petitioners also assert (*ibid.*) that the jury panel was drawn only from the "metropolitan Covington area." Petitioners do not define this term. The jury list maintained by the district court shows that six of the jurors resided in Covington, four resided outside Covington but in Kenton County, of which Covington is a part, and two resided in Boone

demonstrate that the standards of the Cincinnati metropolitan area were *a* possible act of standards for the jury to use. They would not demonstrate that they were the *only* possible community standards to which the jury might refer.

In many cases more than one community may be appropriate. Each juror will come from a political community, from a judicial district, from a "metropolitan area," and from a State. Each of the jurors will belong to all of these "communities" and to others as well. None of them is a perfectly representative community, for none exists. No juror will be familiar with the entire "community."

Petitioners argue that it is difficult for jurors who reside in Covington to know the standards that prevail in the rural portions of the State that are included in the judicial district. But it would be equally difficult for a juror to know the community standards of the entire State of California; a jury instruction referring to statewide standards was upheld in *Miller*. An instruction referring to national

County, adjacent to Covington. We are lodging a copy of that list with the Clerk of this Court. The jurors were drawn from a pool that, under 28 U.S.C. 1861, is required to include individuals from throughout the judicial district. The jury list from which petitioners' jury was selected contains 61 names, including individuals from Campbell, Bracken, Boone, Robertson, Kenton, Pendleton and Mason counties, which span much of northern Kentucky. Petitioners did not challenge this jury array prior to trial as insufficiently comprehensive, and they cannot do so now. 28 U.S.C. 1867(e).

standards was upheld in *Hamling*; even though national standards are not precisely ascertainable, the charge fulfilled the purpose of the community standards charge. What is more, an instruction referring to "community standards" without specifying any community was referred to without disapproval in *Jenkins* v. *Georgia*, *supra*, 418 U.S. at 157.

In this case the charge to the jury fulfilled the purpose of the community standards instructions: to ensure that the allegedly obscene material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." *Miller*, *supra*, 413 U.S. at 33. The instruction permitted each juror "to draw on knowledge of the community or vicinage from which he comes * * *." *Hamling*, *supra*, 418 U.S. at 105. It may well be that in some metaphysical sense the vaguely-defined "metropolitan Cincinnati area" is a "better" community for this purpose than is the Eastern District of Kentucky, but the difference between the two is immaterial for constitutional purposes.[26]

The instructions given in this case served the purpose of making sure that the materials would not be

[26] We said in *Hamling* (Br. 28-29) that "the use of the judicial district as the relevant community is more realistic and practical than a state or the city where the court is sitting. The jurors in federal cases are drawn from a cross-section of the 'community' in the judicial district (see 28 U.S.C. (Supp. II) 1861), and are therefore familiar with the standards of that 'community.'"

judged on the basis of the sensibilities of isolated individuals. They made sure, to the extent possible, that the jurors would draw their standards from the community around them rather than from their own subjective feelings. Like the instructions in *Hamling*, they were constitutionally adequate.[27]

[27] Petitioners have not suggested any reason to believe that the instruction they contend for would have made any difference in the jury's deliberations. Indeed, one expert appearing on petitioners' behalf testified that the community standards in Northern Kentucky do not differ significantly from those of the surrounding region (Tr. 401-402). Another expert based his opinion mainly on the basis of standards in Cincinnati (Tr. 320-323, 334). Nothing in the record suggests that the community standards of Cincinnati differ significantly from those in the adjoining Eastern District of Kentucky.

CONCLUSION

The judgment of the court of appeals should be vacated. The case should be remanded to that court with instructions to view the films and, if it concludes after that view that they may be found obscene under the *Roth-Memoirs* standards and the *Miller* standards, to remand to the district court for a new trial under the *Roth-Memoirs* standards.

Respectfully submitted.

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